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RE CHEW CHEE SUN,
EX P CHAN THEAM SOON

HIGH COURT MALAYA, KUALA LUMPUR

ABDUL AZIZ MOHAMAD J

[BANKRUPTCY NO: D2-29-3012-1997]

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26 JULY 2000

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BANKRUPTCY: *Notice - Setting aside - Excess demand - Application to invalidate notice - Affidavit-in-opposition to bankruptcy notice - Whether affidavit a proper application - Bankruptcy Rules 1969, r. 95 - Whether the filing of affidavit-in-opposition is a waiver of right to raise preliminary objection*

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The judgement creditor served on the judgement debtor a bankruptcy notice which demanded a sum exceeding the amount actually due. In response, the judgement debtor filed an affidavit-in-opposition to the bankruptcy notice, contending that by the excess demand the bankruptcy notice was invalid and ought to be set aside. The senior assistant registrar ruled that the affidavit was not a proper application to set aside the bankruptcy notice. The appellant appealed, raising the issue as to whether the affidavit served as a proper application by which to take up the dispute for adjudication with a view to having the bankruptcy notice set aside as invalid on the ground of mistake of excess demand.

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Held:

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[1] Although the affidavit was accepted as a notice required by s. 3(2)(ii) Bankruptcy Act 1967, it was not an application to invalidate the bankruptcy notice.

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[2] The affidavit was not an affidavit under r. 95(1) Bankruptcy Rules 1969 (BR 1969) which could operate as an application, because its purpose was different from that of an affidavit intended by r. 95(1) BR 1969. Therefore, there was no application or proper application to invalidate the bankruptcy notice before the court.

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[3] The filing of an affidavit-in-opposition cannot be a waiver of the right to raise a preliminary objection because the affidavit was necessary should the preliminary objection failed.

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[Appeal dismissed.]

Case(s) referred to:

Datuk Lim Kheng Kim v. Malayan Banking Bhd [1993] 2 AMR 30 (**fol**)
Development & Commercial Bank Bhd v. Datuk Ong Kian Seng [1995] 3 AMR 2063 (**fol**)
Jasabena Sdn Bhd v. Beh Heng Poo & Anor [1985] 1 MLJ 394 (**refd**)
Malayan Banking Bhd v. Datuk Lim Kheng Khim [1992] 2 MLJ 540 (**refd**)
Malayan Banking Bhd v. Lim Tee Yong [1994] 3 MLJ 715 (**refd**)
Re A Debtor, ex p Debtor [1934] 1 Ch 347 (**refd**)

Legislation referred to:

Bankruptcy Act 1967, s. 3(1)(i), (2)(ii)
Bankruptcy Rules 1969, rr. 18, 94(1)(b), 95(1), (2)
Rules of the High Court 1980, O. 32 r. 13(2)(b)

For the judgment creditor - D Sagadevan; M/s Shearn Delamore & Co
For the judgment debtor - Teh Meng Teck (Richard Lee with him); M/s Cheah Teh & Su

Reported by Izzaty Izzuddin

JUDGMENT**Abdul Aziz Mohamad J:**

The judgment creditor obtained final judgment against the judgment debtor for a certain amount. The judgment did not order interest on the amount. The judgment creditor served on the judgment debtor a bankruptcy notice requiring him to pay within seven days a sum comprising the judgment amount, interest thereon and costs. To the judgment debtor, therefore, to use the words in para. (ii) of the proviso to s. 3(2) of the Bankruptcy Act 1967, “the sum specified in the notice as the amount due exceeds the amount actually due”. For that reason, he sought to invalidate the bankruptcy notice. To be qualified to do that, the paragraph requires him to give to the judgment creditor, within the seven days, notice “that he disputes the validity of the notice on the ground of such mistake.”

The giving of notice under the said para. (ii) is a precondition to be fulfilled before a debtor can proceed to have a judgment notice invalidated on the ground of mistake of excess demand. If he fails to give the required notice, he cannot make the attempt. The usual way of giving notice is by way of a formal letter. After that must follow some form of application for having the judgment notice invalidated because, without an application, the question would not be before the court for adjudication.

- a* What the judgment debtor in this case did within the seven days was to file an “affidavit-in-opposition to bankruptcy notice” in which he complained about the excessive demand in the bankruptcy notice, contended that for that reason the bankruptcy notice was invalid and prayed that it be set aside.
- b* It is accepted by the judgment creditor that the filing of that affidavit served as the giving of notice to him, as required by the said para. (ii), that the judgment debtor disputed the validity of the bankruptcy notice on the ground of mistake of excessive demand. With that, the judgment debtor has fulfilled the precondition for taking up the dispute.
- c* The preliminary question that arises in this appeal and that I am asked to decide first is whether that affidavit serves also as a proper application by which to take up the dispute for adjudication with a view to having the bankruptcy notice set aside as invalid on the ground of mistake of excessive demand. The learned senior assistant registrar ruled that the affidavit was not a proper application and he dismissed the affidavit or, I should rather say, since dismissing is not something apt that one does to an affidavit, that, regarding it as an application that was not proper, he dismissed the application.
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- e* To answer the question, it is necessary to understand something about a bankruptcy notice. It is involved in one of the ten cases or circumstances under s. 3(1) of the Act in which a debtor commits an act of bankruptcy, the commission of which is necessary to provide the ground for a bankruptcy petition. The case of an act of bankruptcy that involves a
- f* bankruptcy notice is the case under para. (i) of s. 3(1).
- A bankruptcy notice may be served on a debtor after the creditor has obtained a final judgment or final order against the debtor for any amount. It requires the debtor to settle the demand, that is to say, pay the sum with interest or satisfactorily secure or compound for it. After service of
- g* the bankruptcy notice on him, the debtor has to do one of two things, and he has to do it within seven days (in case of service in Malaysia). He has to comply with the requirements of the notice, by paying up or securing or compounding satisfactorily for the debt and interest. Alternatively, he has to satisfy the court “that he has a counter-claim, set off or cross
- h* demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid” and which he could not set up in the case in which the judgment or order was obtained. If he fails to do either of those things within seven days, then according to para. (i), he commits an act of
- i* bankruptcy.

How does a debtor set about doing the alternative thing within seven days? The Bankruptcy Rules 1969 provide him with the facility. In the first place, r. 94(1)(b) requires the bankruptcy notice to tell him that if he wishes to do the alternative thing he must, within the seven days, file an affidavit to the effect that he has such a counter-claim, set off or cross demand. The affidavit is in Form No. 7 and is called “affidavit on an application to set aside bankruptcy notice”. No application is required because, by r. 95(1), the filing of the affidavit operates as an application to set aside the bankruptcy notice, for the hearing of which the registrar is required to fix a date, and even if the application cannot be heard within the seven days, r. 95(2) requires the registrar to extend the time and lays down that no act of bankruptcy shall be deemed to have been committed until the application has been heard and determined.

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If the debtor satisfies the court of the existence of such a counterclaim, set off or cross demand, the judgment notice will be set aside, and no act of bankruptcy will have been committed, not, I think, because the judgment notice is inherently bad or invalid, but because it is the policy of the law that a person should not be made a bankrupt on a judgment debt when he has such a counter-claim, set off or cross demand.

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In the present case, the judgment debtor sought to invalidate the judgment notice on the ground of an alleged mistake of excessive demand. He has filed no application in that behalf. He only filed an affidavit entitled “affidavit-in-opposition to bankruptcy notice”, intending it to be treated as an application. The learned senior assistant registrar dismissed the “application” on a preliminary objection.

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In the Bankruptcy Rules 1969, the only instance where the filing of an affidavit is treated as an application is under r. 95(1), and it is so treated especially for the purpose of having a judgment notice set aside for the reason that the debtor has such a counter-claim, set off or cross claim and also, to go only by Form No. 7 because the Rules themselves are silent about it, for the reason that the debtor has satisfied the judgment debt. In every other instance, where there is a need to obtain a decision of the court, an application is necessary, and the application, according to r. 18, has to be in the form of a summons in chambers supported by affidavit.

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In the present case, although the affidavit – which is encl. (4) is accepted as the notice that is required by para. (ii) of the proviso to s. 3(2), it is not an application to invalidate the bankruptcy notice. It is not an affidavit under r. 95(1), which can operate as an application, because its purpose is different from that of an affidavit intended by r. 95(1).

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- a* The learned senior assistant registrar was therefore right that there was no application or no proper application before the court.

- b* In *Malayan Banking Bhd v. Datuk Lim Kheng Khim* [1992] 2 MLJ 540, the judgment debtor had filed an affidavit – without an application – to invalidate the judgment notice on the ground of excessive demand. The affidavit was encl. 3 in that case. To my understanding, Abdul Hamid J (he was JC then) treated the affidavit as falling under r. 95 and therefore as an application. I say that because at p. 548A and I he said that the affidavit was filed pursuant to para. (ii) of the proviso to s. 3(2) and r. 95, and at p. 552 A-B he said the following, of which the second sentence is pertinent:

- d* The law as I understand it is, if a judgment debtor intends to satisfy the court that there is a counterclaim, set-off or cross-demand, he must file an affidavit within seven days of the service of the bankruptcy notice on him – s. 3(1)(i) and r. 95. Similarly, if he intends to dispute the sum stated in the bankruptcy notice as the amount due, he has to give notice to that effect (usually by affidavit) also within seven days – s. 3(2) proviso (ii) and r. 95.

- e* Abdul Hamid J proceeded to deal with the affidavit, treating it as an application, there apparently being no question raised as to whether there was an application or proper application, and, after hearing argument and finding that the claim of excessive demand had not been proved, dismissed the “application.”

- f* That “application” was decided together with the bankruptcy petition, of which the outcome was the making of receiving and adjudication orders. The decision granting the receiving and adjudication orders was taken on appeal to the Supreme Court, whose decision is reported in *Datuk Lim Kheng Kim v. Malayan Banking Berhad* [1993] 2 AMR 30:1285. The appeal was dismissed. Mohamed Dzaidin SCJ, in giving the reasons for the decision, said at p. 1288 lines 35-40 that the Supreme Court had no reason to disagree with the decision of Abdul Hamid J. But I take that to refer to the decision to make the receiving and adjudication orders and not to every view that the learned judge took in arriving at the decision. I say that because as regards the encl. 3 affidavit, after considering the decision in *Re A Debtor, ex parte Debtor* [1934] 1 Ch 347 CA, Mohamed Dzaidin SCJ had this to say at p. 1290 line 40 to p. 1291 line 5:

- i* We are concerned here with the content of the said affidavit. It merely denies and disputes that the appellant was indebted to the respondent in the sum of RM2,603,913.28, but fails to disclose that he has a counterclaim, set-off or cross-demand etc. against the respondent, which he is required to depose under

s. 3(1)(i) of the Act and provided for in Form 7. Following the above decision and in the face of the above affidavit, we are of the opinion that the said affidavit cannot operate as an application to set aside the bankruptcy notice within the contemplation of s. 3(1)(i) of the Act, and the case should have been treated as if no affidavit under Rule 95 had in fact been filed. Similarly, as para 3 of the Enclosure merely disputes his indebtedness in the said sum to the respondent “based on an erroneous calculation and grossly exaggerated” without condescending to particulars of the amount actually due, we say that the said affidavit does not attract proviso 2(ii) of s. 3 which states that a bankruptcy notice shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the actual amount due.

The reason why Mohamed Dzaidin SCJ said that “the case should have been treated as if no affidavit under r. 95 had in fact been filed” was, obviously, because the affidavit in that case was not an affidavit claiming that the debtor had such a counter-claim, set off or cross demand as is laid down in para. (i) of s. 3(1) and because only such an affidavit could be treated as an affidavit under r. 95. Because the affidavit was not an affidavit under r. 95 it could not operate as an application to set aside the bankruptcy notice as provided by the rule, and because no other rule enabled the affidavit to operate as an application, it could not at all be treated as an application for whatever purpose. That, to me, is the inevitable implication and consequence of those words. As to the subsequent words about the failure to condescend to particulars, I do not understand them as qualifying the effect of the earlier words as if the Supreme Court were saying that were the affidavit to have particularised the excess it would have qualified as an affidavit under r. 95 that could operate as an application. It was altogether a separate point and an additional point. I think what the Supreme Court meant was that apart from the affidavit not qualifying as an affidavit under r. 95, it did not suffice as an affidavit in support of an application to invalidate the bankruptcy notice for the mistake of excessive demand because it did not particularise the alleged excess. And I think that was in reference to Abdul Hamid J’s resorting to the “affidavit in opposition” to the bankruptcy petition, as a further affidavit to the encl. 3 affidavit-application, for particulars of the alleged excess.

The matter is clinched at p. 1292 lines 30-35, where Mohamed Dzaidin SCJ said that “... challenges to the creditor’s petition or bankruptcy notice other than that he has a counter-claim, set-off or cross-demand which equals or exceeds the judgment debt, must be made by filing a notice of motion” – now summons in chambers – “supported by an affidavit”.

- a* It was submitted in this appeal that the judgment debtor should be excused for failing to file a proper application because the approach taken by him was in accordance with the practice of the court, the reference being, I presume, intended to include the decision of Abdul Hamid J. But, as has been seen, if there had been any such precedent, the views of the Supreme Court that I have set out earlier should have broken it.
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- I have asked myself whether the failure to apply by summons in chambers can be overlooked. After all, it could not have added anything to the essence or substance of the matter if there had been a summons in chambers. It is the affidavit that is important, and there has been an affidavit in reply to it. Why cannot the affidavit be regarded judicially as an application just as statutorily the r. 95 affidavit is treated as an application? But r. 18 says that every application shall be made by summons in chambers and I am afraid that if I were to overlook that requirement, much as I would like to be able to, I would be going against the pronouncement of the Federal Court in *Development & Commercial Bank Berhad v. Datuk Ong Kian Seng @ Ong Kin Cheang* [1995] 3 AMR: 2063 at p. 2073 lines 5-10 that “no breach of a mandatory rule can be described as a formal defect or an irregularity that can be cured”.
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- Finally, there is the question of failure to give notice of the preliminary objection before it was raised before the learned senior assistant registrar, which learned counsel for the judgment debtor described as a “fall-back” point. It is admitted that there was no notice, verbal or written. Although the appeal before me is a rehearing, I think that if failure to give notice disentitled the judgment creditor from raising the preliminary objection at first instance, the disentitlement should be maintained at the appeal stage.
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- The authority relied on by learned counsel for the judgment debtor that is directly in point is *Jasabena Sdn Bhd v. Beh Heng Poo & Anor* [1985] 1 MLJ 394. In that case the preliminary objection was considered and, after giving his reasons for finding that it was without any merit, Edgar Joseph Jr J (as he then was) said at p. 396:
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Moreover, the Respondents in this case had clearly waived their right to take the preliminary objection by filing affidavits in opposition and failing to give to the Applicant prior notice of their intention to raise the preliminary objection.

- h* The preliminary objection was then dismissed.

- It was a point of waiver on account of the filing of affidavits in opposition and the failure to give notice, which circumstances exist in the present case.
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I might feel confident about following that statement were the learned judge to have found that there was merit in the preliminary objection, as I find in this case, but nevertheless dismissed it by reason of waiver of the right to raise it. I feel that the inference of waiver from those circumstances is too strong a consequence. The filing of an affidavit in opposition cannot be a waiver of the right to raise a preliminary objection because the affidavit is necessary should the preliminary objection fail. As to failure to give notice, the most that should arise from it procedurally is that the other side would have been caught by surprise and might not be able to argue immediately against the preliminary objection, in which case the matter should be postponed and the other side be compensated with costs.

It is easier to see a basis for implied waiver in *Malayan Banking Bhd v. Lim Tee Yong* [1994] 3 MLJ 715, another case relied on by the judgment debtor's counsel. In that case the plaintiffs had filed an affidavit in reply outside the 14-day period contrary to O. 32 r. 13(2)(b) of the Rules of the High Court 1980. When the case first came up for hearing, the defendants' counsel, instead of raising objection to the affidavit, sought a postponement to enable the defendants to reply to it. Mohd Hishamudin JC (now J) held that for that reason the defendants had, on that day, waived his right to object to the plaintiffs' affidavit. The defendants' counsel had the opportunity to raise objection to the plaintiffs' affidavit on the first day and to render an affidavit in reply unnecessary if the objection was upheld. Instead he wanted to file an affidavit in reply and asked for a postponement of the plaintiffs' application to enable him to do so. I can appreciate it if to Mohd Hishamudin J the circumstances meant that the defendants did not intend to object to the plaintiffs' affidavit. But I am not persuaded by the circumstances in this case that the judgment creditor had impliedly waived his right to raise the preliminary objection.

To conclude, the affidavit at encl. (4) is not properly an application for invalidating the bankruptcy notice on the ground of mistake of excessive demand.

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